87 60

NO.

Supreme Court, U.S.
FILED
JUL 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

STEVE McCORMICK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WALTER W. BUSSART
Thompson & Bussart
1919 Pennsylvania Avenue N.W.
Suite 850
Washington, DC 20006
(202) 887-1490
Attorneys for Petitioner
Steve McCormick

QUESTIONS PRESENTED

1) Does the statute of limitations commence to run in criminal Sherman Act bidrigging conspiracy cases from the time at which the actual or attempted restraint of trade occurs?
2) Does the statute of limitations commence to run in criminal Sherman Act bidrigging conspiracy cases from the time at which the conspiracy successfully restrains trade?
3) Does the statute of limitations commence to run in criminal Sherman Act bidrigging conspiracy cases upon the resumption of competitive behavior?
4) Does payment by an awarding authority for performance of a contract obtained by bidrigging constitute an overt act in furtherance of a criminal Sherman Act conspiracy which has already successfully restrained trade?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	ii
Opinions Below	1
Jurisdictional Statement	1
Statutory Provisions	1
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	7
Appendix A	8
Appendix B	20
Appendix C	29

TABLE OF AUTHORITIES

Cases

Addyston Pipe and Steel Co. v. *United States*, 175 U.S. 211 (1899) 4

United States v. *Evans and Associates, Inc.*, 87-1131 - 1132 (10th Circuit) 7

United States v. *Kissel*, 218 U.S. 601 (1910) 5

United States v. Trenton Potteries Co., 273 U.S. 392 (1927) 5

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 5

Statutes

15 U.S.C. 1 2,3

18 U.S.C. 3282 2,3

IN THE

Supreme Court of the United States

October Term, 1987

No.

NORTHERN IMPROVEMENT COMPANY;
STEVE McCORMICK;
AND F-M ASPHALT, INC.;

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the United States District Court for the District of North Dakota is reported at 632 F.Supp. 1576 (D.N.D. 1986). (Appendix at 8 .) The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 814 F.2d 540 (8th Cir. 1987). (Appendix at 20.)

JURISDICTION

The order of the United States Court of Appeals for the Eighth Circuit, reversing the dismissal of the indictment by the United States District Court for the District of North Dakota and remanding the case for trial, was entered on March 24, 1987. The order of the United States Court of Appeals for the Eighth Circuit denying petitions for rehearing was entered on May 8, 1987. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The statutory provisions involved in this case are section 1 of the Sherman Act, 15 U.S.C. § 1, and the five-year statute of limitations for noncapital offenses, 18 U.S.C. § 3282.

Section one of the Sherman Act provides:

> 1. Trusts, etc., in restraint of trade illegal; penalty
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. 1.

Section 3282 of Title 18, United States Code, provides:

> 3282. Offenses not capital
>
> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. § 3282.

STATEMENT

Petitioner, a vice president of a family owned contractor, was indicted on one count of violating section one of the Sherman Act, 15 U.S.C. § 1, on October 9, 1985. The district court dismissed the indictment on the ground the prosecution was barred by the statute of limitations, 18 U.S.C. § 3282. The government appealed the dismissal to the United States Court of Appeals for the Eighth Circuit which reversed the district court's dismissal and remanded the indictment for trial.

The indictment alleges that petitioner and other co-conspirators engaged in a conspiracy in unreasonable restraint of interstate trade and commerce by submitting collusive and rigged bids to three cities. The government conceded that the last submission of rigged bids pursuant to the conspiracy occurred on June 16, 1980, outside the limitations period. The projects were also awarded more than five years prior to the return of the indictment.

The government sought to bring the prosecution within the five year limitations period by alleging that the rigged bids submitted outside the limitations period, were submitted with "the expectation that the low bidder would be paid by the city awarding the project." (Indictment, paragraph 19b). The government also alleged that the receipt and acceptance of payments for performance of the contracts allegedly obtained by bid rigging was an overt act in furtherance of the conspiracy. (Indictment, paragraph 19e). Each of the effects of the conspiracy alleged by the government (Indictment, paragraph 20) occurred more than five years prior to the return of the indictment.

The district court dismissed the indictment on the basis that the conspiracy had achieved its purpose (and its success or failure determined) when

the last allegedly rigged bids were submitted, because no other action in furtherance of the conspiracy was necessary or taken after that time. The court found that no guarantee existed that any or all of the rigged bids would be a successful bid and that award of the project defined the revenues which could be received by the successful bidder. The court found and the government conceded no consolation payment or subcontract opportunity to unsuccessful bidders after submission of the bid which might have furthered the conspiracy.

The Eighth Circuit Court of Appeals reversed, finding that the objective and purpose of a bid rigging conspiracy is illicit gain rather than restraint of trade and that the purpose of the conspiracy was to obtain the receipt of illicit payments.

REASONS FOR GRANTING THE PETITION

This case presents an important and unsettled question (as evidenced by the disagreement between the district court and the court of appeals) of the termination of antitrust bid rigging conspiracies.

This Court has long held that bid rigging and price fixing conspiracies are illegal regardless of the reasonableness of prices fixed. *Addyston Pipe and Steel Co. v. United States,* 175 U.S. 211, 237 (1899). The Eighth Circuit's holding, that the statute of limitations does not commence to run until payments containing inflated profits are received, creates a dual statute of limitations for Sherman Act offenses which depends upon reasonableness of prices and the existence of illicit profits. Where prices are reasonable or below market, payments presumably would not contain illicit profit and the statute of limitations would run from the submission of the bid. Such a dual statute of limitations

depending upon the reasonableness of prices and profits would result in differing limitations periods for the same conspiracy over time because, as this Court has stated, "the reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow." *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927).

The Eighth Circuit's holding that payment for work performed pursuant to a contract obtained by bid rigging is an act in furtherance of the bid rigging conspiracy, extending the statute of limitations, is inconsistent with this Court's holding in *United States v. Kissel*, 218 U.S. 601, 608 (1910), that the continuance of a result of a crime does not continue the crime. The result of a successful bid rigging conspiracy is that an awarding authority enters into a contract with a predesignated low bidder. That predesignated low bidder then may obtain payment but only by performance of the contract. The contract and its performance are mere results of a successful bid rigging conspiracy and do not constitute acts which furher it. Conversely, a predesignated low bidder's failure to perform a contract would not and could not represent the failure of a bid rigging conspiracy. The eighth circuit did not articulate how payment furthered the conspiracy; its holding confuses motive (to profit) with purpose (to restrain trade). Acts which further purpose can be overt acts. Continuing results, no matter how closely related to motive, cannot be deemed overt acts unless they further the purpose.

The Eighth Circuit's holding is also inconsistent with this Court's prior opinions concerning withdrawal from a Sherman Act conspiracy. In *United States v. United States Gypsum Co.*, 438 U.S. 422,

464-465 (1978), this Court held that affirmative acts inconsistent with the purpose of a price fixing conspiracy, such as resumption of competitive behavior, communicated in a manner reasonably calculated to reach co-conspirators are sufficient to establish withdrawal from or abandonment of an antitrust conspiracy. If the Eighth Circuit's holding is allowed to stand in this case, resumption of competitive behavior would no longer constitute withdrawal or abandonment in prosecutions in which prices were fixed at a high level or illicit profits obtained because later acceptance of contract proceeds or payment of an invoice from previous bid rigging or price fixing would represent a later overt act, negating withdrawal or abandonment. Thus, whether or not abandonment or withdrawal could be established would also depend upon the reasonableness of prices and the presence or absence of "illegal" profit.

During the first 94 years of the Sherman Act's history, the government has never sought to prosecute price fixing or bid rigging activity based upon the statute of limitations theory which it successfully urged upon the Eighth Circuit Court of Appeals. Under the theory adopted by the Eighth Circuit Court of Appeals the government could, for example, prosecute price fixing between two banks on 30 year mortgages, up to 35 years after the conspiracy was effectively abandoned. If the cost of money rose after effective abandonment so that the fixed mortgage rates became unprofitable to the banks, the government would presumably be denied the right to prosecute more than five years later. If the cost of money then fell to the point where the banks were obtaining "illicit profit", prosecution would presumably again be possible during the term of existing mortgages even though the con-

spiracy had been abandoned 20 or 30 years earlier.

Throughout the country, the government has commenced to prosecute additional price fixing and bid rigging cases based upon the Eighth Circuit's holding. One of these cases, *United States v. Evans and Associates, Inc.* is now pending in the Tenth Circuit Court of Appeals. Substantial private and public judicial resources will be expended in the lower courts in connection with the issues raised by this petition unless this Court promptly resolves the issues presented.

CONCLUSION

For the reasons set forth herein, this Petition for Certiorari should be granted.

Respectfully submitted,

WALTER W. BUSSART
Thompson & Bussart
1919 Pennsylvania Avenue N.W.
Suite 850
Washington D.C. 20006
(202) 887-1490
Attorneys for Petitioner
Steve McCormick

APPENDIX A
IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN IMPROVEMENT COMPANY;
STEVE McCORMICK;
AND F-M ASPHALT, INC.;

Defendants.

ORDER OF DISMISSAL

The Defendants are charged with a violation of the Sherman Act, 15 U.S.C. § 1, by an indictment which charges:

Offense Charged

17. Beginning at least as early as 1975, and continuing at least through July 28, 1981, the exact dates being unknown to the grand jury, the Defendants and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. Section 1).

18. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and coconspirators, a substantial term of which was to submit collusive, noncompetitive and rigged bids to the City of Fargo, North Dakota, the City of West Fargo, North Dakota, and the City of Moorhead, Minnesota, for the award of municipal street

improvement projects in those cities.

The "overt acts", as set forth in the indictment are:

A. Discussing the submission of prospective bids;

B. Agreeing on a designated successful bidder with the expectation that such successful bidder would ultimately be paid for the work done;

C. Submitting rigged bids;

D. Submitting bids containing false statements;

E. Receiving and accepting payments.

The Bill of Particulars, filed Under Seal by the Government and as limited by this Court recites the following:

> The period of time covered by the Indictment in this case begins at least as early as 1975 and continues at least through July 28, 1981. The latter date was the date on which the City of Fargo, North Dakota made final payment for the work performed on Improvement District No. 3682, which was let by the City of Fargo on March 3, 1980 and was won by Northern Improvement Company.
>
> The evidence will show that defendants, individually and through their officers, directors, agents, employees and representatives, participated in a conspiracy to rig the bids on municipal street improvement projects in the cities of Fargo, North Dakota, West Fargo, North Dakota and Moorhead, Minnesota. Generally, the conspirators agreed which company would be the low bidder on those projects, and the designated low bidder then provided bid amount numbers for the other coconspirators to use in preparing their bids so that those bids would be intentionally

high and noncompetitive. The evidence will show, among other things, that there were meetings and conversations involving representatives of Northern Improvement Company, William Collins, Inc., S&S Construction Co, and F-M Asphalt, Inc. throughout the conspiracy period and that in these meetings and conversations the bids for numerous municipal street improvement projects were rigged. The conspirators carried out this conspiracy by submitting the collusive bids to the municipal letting agencies and receiving payments from the municipalities which had been defrauded into believing they had received competitive bids. The conspiracy continued until at least July 28, 1981 when final payment by check was made by the City of Fargo to Northern Improvement Company for work on a project let by the City of Fargo on March 3, 1980. Northern Improvement Company received and deposited this check to its accounts.

Numerous municipal street improvement projects were rigged as part of the conspiracy. Payments for the following municipal street improvement projects, which, among others, were rigged as part of the conspiracy, were made and received on or after October 9, 1980.

1. City of Fargo, North Dakota
   Project No. 3682
   Let on March 3, 1980
   Winning bidder-Northern Improvement Company
   Final payment date - July 28, 1981 [1]

[1]Final payment dates are in some instances approximations.
(Footnote in original document.)

2. City of Fargo, North Dakota
   Payment (sic) No. 3688
   Let on March 24, 1980
   Winning bidder - F-M Asphalt, Inc.
   Final payment date - January 27, 1981
3. City of Fargo, North Dakota
   Project No. 3669
   Let on April 7, 1980
   Winning bidder-Northern Improvement Company
   Final payment date - December 9, 1980
4. City of Fargo, North Dakota
   Project No. 3687
   Let on April 7, 1980
   Winning bidder - William Collins, Inc.
   Final payment date - January 13, 1981
5. City of Fargo, North Dakota
   Project No. 3693
   Let on April 7, 1980
   Winning bidder-Northern Improvement Company
   Final payment date - July 28, 1981
6. City of Fargo, North Dakota
   Project No. 3695
   Let on June 16, 1980
   Winning bidder - S&S Construction Co.
   Final payment date - December 16, 1980
7. City of West Fargo, North Dakota
   Project No. 2046
   Let on May 21, 1979
   Winning bidder - S&S Construction Co.
   Final payment date - October 9, 1980
8. City of West Fargo, North Dakota
   Project No. 2048
   Let on July 30, 1979

Winning bidder - F-M Asphalt, Inc.
Final payment date - December 2, 1980

9. City of Moorhead
Project No. 79-A2-3
Let on July 10, 1979
Winning bidder - Northern Improvement Company
Final payment date - November 23, 1981

10. City of Moorhead
Project No. 79-A3-1
Let on July 10, 1979
Winning bidder - F-M Asphalt, Inc.
Final payment date-December 26, 1980

The Government believes that evidence will further show that the combination and conspiracy was partly express and partly implied.

The indictment was issued on October 9, 1985. The Defendants have made a Motion to Dismiss the Indictment and have agreed, for the purpose of their Motion, that we may assume that all of the information contained in the indictment is true.

The Defendants base their Motion to Dismiss the Indictment on a claim that the government failed to indict during the applicable statute of limitations period. The Defendants argue that they are charged with a conspiracy to violate the Sherman Act by agreeing to submit 'rigged bids.' The consideration for the agreement, as charged by the government, was that each individual conspirator would be given an opportunity to bid on a job without the other co-conspirators bidding competitively on that particular project.

The Defendants' position is that the bids were submitted and contracts awarded pursuant to those bids. The last contract award was made five years

and two months prior to the indictment date. At this point any "conspiracy" was over, and the purposes fully accomplished. Since the statute of limitations provides for a five-year period, the prosecution is barred.

The Government, on the other hand, argues that the purpose of the conspiracy was to profit illegally through the rigged bids. That purpose was not accomplished until payments on the noncompetitive bids were received by the conspirators. The payments for the bid projects were received during the five-year period prior to the indictment, therefore, the prosecution was timely.

The crime charged is a per se violation of the Sherman Act. It does not matter that the actual bids submitted by the 'designated bidder' on a project were higher or lower than the fair market value of the job. If, in fact, the 'designated bidder' submitted a bid which was far below the reasonable value and lost money, that would be no defense to the criminal charge. The specific charge against the Defendants requires no proof of the economics of the matter, only that an agreement was made to bid in a collusive way. The crime would be complete even if none of the 'designated bidders' was successful in obtaining a contract award. It is simple common sense, however, to conclude that the motivation of the conspirators was not altruistic. The Court readily accepts that the conspirators hoped to profit financially through the performance of the project which was assigned to each, and, in order to profit, one must be paid for the project. The Court also concludes that all contractors bidding, legally or otherwise, were similarly motivated.

ISSUE

The issue presented is fairly narrow. Which event

triggered the statute of limitations -- the bid offer, the contract award, or the payment?

ANALYSIS

Counsel for each side offer the same cases in support of their respective and opposite positions. The prosecution has recently called the attention of this Court to a shiny new decision of the United States Court of Appeals for the Fourth Circuit as good authority for the government's position. As expected, the Defendants have urged that the case is also good authority for their position.

In *United States v. A-A-A Electrical Co., Inc.*, No. 85-5116 (4th Cir. April 14, 1986), the defendants were charged with violating Section 1 of the Sherman Act by forming a conspiracy to submit rigged bids on a city airport project in restraint of trade. The defendants preserved their right to appeal from an order denying a Motion to Dismiss based upon the statute of limitations, and entered a guilty plea. The Circuit Court affirmed the trial court.

In the language of the Court:

> The bids submitted on June 25, 1979, in fact were not competitive and, before that date, appellants and others had conspired to rig the bids on the project. The conspirators, including appellants, discussed their bids before submitting them and designated A-A-A as the conspirator who would submit the lowest rigged bid. (A-A-A was awarded the contract on July 5, 1979.) A-A-A performed the contract and received final payment for its work in 1980. *In May, 1980, A-A-A paid off its co-conspirators for their participation in the bid rigging.*

Slip Op. at 3 (emphasis added).

The defendants in A-A-A were indicted on August 28, 1984. One of the issues on appeal, and the one that concerns us here, is whether the five-year statute of limitations ran from the date of the submissions of rigged bids or the date the defendants were paid for the project and paid off their co-conspirators. If the statute began to run on July 5, 1979, (the date the bids were submitted) then the indictment on August 28, 1984 came 5 years and 54 days after the conspiracy ended. If the statute began to run in May of 1980, (the time when the defendants were paid and when they paid off their co-conspirators) then the indictment would have come 4 years and 4 months after the conspiracy ended.

The Court concluded that "a Sherman Act conspiracy continues through the time of illegal payoffs and receipt of payments." Slip Op. at 6. The Court based its decision on the following reasoning:

> As long as some action is necessary to achieve a conspiratorial objective, a conspiracy, under the Sherman Act or otherwise, continues until the offense has been abandoned or until the objective is accomplished. (citations omitted.)
>
> In this case, the indictment charged and appellants admitted by their guilty pleas that the conspiracy by its terms included the rigging of a bid, the securing of an artificial price for the (project), and payoffs to the co-conspirators who helped secure the project. Moreover, the requests for payments, which, like the payoffs were also made in 1980, reflected the inflated and noncompetitive price

> for the work. These later acts were necessary to the successful consummation of the bid rigging agreement. In fact, as the government points out, the conspirators had to continue cooperating in order for these objectives to be achieved.

Slip Op. at 6-7.

Therefore, the Court concluded that the statute of limitations did not begin to run until May of 1980 and the indictment came within the five-year period.

Both sides have also urged that *United States v. INRYCO, Inc.*, 642 F.2d 290 (9th Cir. 1981) supports their opposite positions. This, too, is a bid rigging case where the consideration for the conspiracy was the award of a subcontract to one of the successful bidder's co-conspirators. The Court held that the purpose of the conspiracy was not accomplished until the subcontracts were awarded, and therefore, the statute did not begin to run until that date.

The government urges that the cited cases are authority for the contention that the purpose of the conspiracy is not realized until payment is received, pointing out that the indictment alleges receipt of payment as an overt act and illegal enrichment as the ultimate object.

The defense urges that the same cited cases are authority for their position that the statute began to run when bids were submitted, as no other 'partnership purpose' remained to be done. The defense also indicates that the cases cited illustrate that payoffs or subcontract awards show the types of agreements which have a continuing partnership purpose.

The basic principle is clear. Although all of the

necessary elements of the crime may have occurred, the statute does not begin to run until the purpose of the illegal conspiracy has been accomplished or abandoned. For so long as there is a continuing partnership purpose, the act of a 'partner' is deemed the act of all, if done in furtherance of the aims of the 'criminal partnership.'

A conspiracy to submit rigged bids is a crime even if no bids are submitted or if the rigged bid is not successful. If the bid is successful, then the conspiracy could continue either (a) as long as some other 'partnership purpose' remains, such as 'payoffs' or 'subcontract awards,' or (b) (as the government alleges) until any of the co-conspirators receives the ultimate purpose - the receipt of payment under the rigged bid.

Each of these possible combinations presents a different timeframe for computation of the statute of limitations.

In its initial denial of the Motions to Dismiss, this Court indicated that the resolution required a complete factual record. Since that time, the Court has had the benefit of oral arguments, a Bill of Particulars, and further briefing generated by the Court's expression of concern that a decision after a three or four week trial with great expense to all concerned was not the most intelligent course of proceeding. An appeal of this order will present the matter to the Circuit Court in advance of that expense. As the Court believes its decision is correct, it is better for all concerned that this order be entered now rather than later.

This case is clearly distinguishable from both A-A-A and INRYCO. No claim is made that the parties engaged in any joint action after submitting the rigged bids. The indictment and the Bill of Par-

ticulars allege an agreement resulting in each defendant being the "designated bidder' on a separate project. The consideration between the 'criminal partners' was the abstention of the others from bidding competitively upon each other's 'designated project.' The terms and conditions of the illegal contract were completed when the rigged bids were submitted. No sharing of the spoils after payment or showing of favoritism on subcontract award is present.

Under the indictment and Bill of Particulars, the Court is forced to the conclusion that the purpose of the conspiracy was accomplished when the rigged bids were submitted. No guarantees existed that any or all of the rigged bids would be a successful bid. Each contractor, if successful as the bidder, had the opportunity to profit or lose money on a specific project. If unsuccessful as a bidder, no consolation payment or subcontract opportunity is present. No co-conspirator had any participation rights or obligation to the others after the bid was submitted.

Each individual conspirator who was awarded a bid received payment upon completion of that project. Common sense tells us that the hope of the opportunity to profit was a common motivating factor behind the formation of the conspiracy. It does not follow, however, that the purposes of the 'criminal partnership' survived the bid submissions. Once the bids were submitted, only the interest of each individual bidder, as an individual and not as a co-conspirator, remained. No partnership interest or conspiracy purpose remained. Therefore, this situation is distinguishable from the situation in *A-A-A* and *INRYCO* where there were 'payoffs' made to co-conspirators after the bids were submitted.

From this analysis, the Court concludes that the indictment was not filed within the five-year statute of limitations period, and the prosecution is barred.

THEREFORE, THE DEFENDANTS' MOTION TO DISMISS IS GRANTED.

Dated this 25th day of April, 1986, at Bismarck, North Dakota.

Patrick A. Conmy, Chief Judge
United States District Court

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States of America,

Appellant,

vs.

Northern Improvement Company;
William Collins, Inc.;
F-M Asphalt, Inc.; S & S
Construction Co.; and Steve McCormick;

Appellees.

Civil No. 86-5216
Filed: March 24, 1987

Appeal from the United States District Court, District of North Dakota, Southeastern Division, the Honorable Patrick A. Conmy, Chief Judge.

REVERSED AND REMANDED.

Opinion of the Court by John R. Gibson, Circuit Judge.

Andrea Limmer, Lorenzo E. Bracy, and Mary E. Jones, of the Department of Justice for Appellant.

Kermit Edward Bye, of Vogel, Brantner, Kelly, Knutson, Weir & Bye, Ltd., for Appellee Northern Improvement Company.

Richard J. Braun, of Thompson & Brussart, for Appellee Steve McCormick.

David Melincoff, of O'Connor and Hannan, for Appelle F-M Asphalt, Inc.

The United States appeals from the dismissal of an indictment against Northern Improvement Company, F-M Asphalt, and Steve McCormick, charging them with violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), on the ground that it was barred by the statute of limitations. The indictment charged participation by the defendant-appellees in

a collusive, non-competitive submission of rigged bids to the cities of Fargo and West Fargo, North Dakota, and Moorhead, Minnesota for the award of municipal improvement projects; the award of various projects to the defendants; and the receipt by the defendants of payment for these projects. The district court held that the last act triggering the running of the five year statute of limitations was the submission of the rigged bids rather than the receipt of payments pursuant to the contracts awarded on the bids. We conclude that the statute did not run until receipt of the payments; we reverse the judgment of the district court dismissing the indictment and remand for trial.

The indictment alleged that the three cities invited municipal street improvement contractors to submit sealed competitive bids on various projects. After the receipt and opening of the bids at a process known as a "bid letting," the cities awarded contracts to the lowest bidder. The indictment charged that as early as 1975 and continuing at least through July 28, 1981 the defendants and others engaged in a continuing agreement to submit collusive, non-competitive, rigged bids to the cities. To effectuate the conspiracy, the indictment charged that the defendants discussed the submission of prospective bids and agreed who among them would be the low bidder with the expectation that it would be awarded the project; that they submitted intentionally high non-competitive bids on some of the projects; and that they received and accepted payments from the cities for work performed on the projects. The bill of particulars detailed the meetings and conversations among the defendants. It alleged that the conspirators agreed which one would be the low bidder on each project and that the designated low bidder provided the

others with numbers to use in preparing their bids so that the other bids would be high and non-competitive. The conspiracy allegedly continued "at least" until July 28, 1981 when the City of Fargo made its final payment to Northern Improvement Company for work on one of the projects that had been let on March 3, 1980.

The indictment was filed on October 9, 1985. The defendants moved to dismiss the indictment on the ground that it was barred by the five-year statute of limitations. 18 U.S.C. § 3282 (1982). When the motion to dismiss was filed, the district court defined the issue as being whether the statute of limitations was triggered by the bid offer, the contract award, or the payment. It concluded that there was no sharing of spoils after the payments on the contracts or showing of favoritism on subcontract awards and that, under the indictment and bill of particulars, the purpose of the conspiracy was accomplished when the rigged bids were submitted. The conspiracy, therefore, terminated at that time. The district court dismissed the indictment.

The government appeals, arguing that the conspiracy continued until all of its objectives were achieved and until the contemplated illicit gain was realized, *i.e.,* Northern Improvement received payment on one of the contracts on June 28, 1981.

A conspiracy is a "partnership in criminal purposes." *United States v. Kissel,* 218 U.S. 601, 608 (1910). "The crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines *** the duration of the conspiracy ***." *Grunewald v. United States,* 353 U.S. 391, 397 (1957). While a Sherman Act conspiracy is technically ripe when the agreement to restrain competition is formed, "it remains actionable until

its purpose has been achieved or abandoned." *United States v. Inryco,* 642 F.2d 290, 293 (9th Cir. 1981) (citing *Kissel,* 218 U.S. at 607-08), *cert. dismissed,* 454 U.S. 1167 (1982). As this court said some years ago: "A criminal conspiracy once formed continues until the object of it has been accomplished unless abandoned short of an overt act, or broken up by the arrest of the participants." *McDonald v. United States,* 89 F.2d 128, 133 (8th Cir.), *cert. denied,* 301 U.S. 697 (1937). We have no difficulty in concluding that the conspiracy charged in the indictment continued until Northern Improvement received payment and, accordingly, the five-year statute of limitations had not run against the defendants.

The defendants contend that the only substantive term of the conspiracy was the agreement to submit the rigged bids. This agreement and the submission of the rigged bids are, the defendants argue, the only acts charged against the defendants as being in furtherance of the conspiracy. The indictment and bill of particulars, however, plainly charge the defendants with having entered their bid rigging agreement "with the expectation that (the agreed upon) low bidder would be awarded the project and paid by the city awarding the project for the construction of the project ***." Designated Record at 8. They are also charged with "receiving and accepting *** payments for work performed on *** municipal street improvement projects." *Id.* at 9. As indictments are to be read in a common sense, non-technical manner, *United States v. Pleasant,* 469 F.2d 1121, 1125 (8th Cir. 1972), we do not doubt that this indictment is broad enough to encompass the event--receipt of payment--on which the government relies to bring the defendants' activities within the statute of limitations.

The district court nonetheless concluded that the "purpose" of the conspiracy terminated at the time the bids were submitted, as that was the moment when the "terms and conditions of the illegal contract were completed." *United States v. Northern Improvement Co.,* No. C3-85-062, slip op. at 9 (D.N.D. April 25, 1986). No conspirator owed any right or obligation to any other conspirator beyond that point. After the bids were submitted, "only the interest of each individual bidder, as an individual and not as a co-conspirator, remained." *Id.* at 10. We do not agree.

The purpose of entering the conspiracy, and the purpose of submitting the rigged bids, were not merely to restrain competition for the satisfaction of violating the Sherman Act. We do not deal here with criminal behavior that is an end in itself. Common sense tells us that the conspirators' purpose was to reap the benefit of the conspiracy: to be awarded public improvement contracts at anti-competitively high prices and to be paid for those contracts. As we stated in the different but analogous context of a conspiracy to transport a kidnapped person held for ransom across state lines,

> What was the object to be attained by the capture and detention of Brenner? Clearly, it was not for the mere pleasure of his company at the "hide-out" over in Illinois, or in moonlight joy rides back and forward across the Illinois, Wisconsin, and Minnesota boundaries. But as in almost all cases which fall under the ban of the statute, the seizure and detention of Brenner was for the purpose, therefore with the object of illicit gain.

McDonald, 89 F.2d at 133.

As in *McDonald,* the object and purpose of this

illegal agreement was "illicit gain," the receipt of payments, and we conclude that the district court erred in holding that the purpose of the conspiracy terminated the moment the bids were submitted.

Our conclusion that the scope and purpose of the conspiracy included the receipt of payments on the contracts awarded pursuant to collusive, non-competitive bids does not answer the defendants' contention that the mere unilateral receipt by a conspirator of payment does not constitute an "overt act" in furtherance of the conspiracy. The district court accepted this proposition. It observed that "(n)o claim is made that the parties engaged in any joint action after submitting the rigged bids. *** No sharing of the spoils after payment or showing of favoritism on subcontract award (was) present." *Northern Improvement,* slip op. at 9. We believe, however, that Northern Improvement's acceptance and retention of payment was an overt act in furtherance of the conspiracy.

Two recent cases from the Fourth and Ninth Circuits are particularly instructive on this issue. In *United States v. A-A-A Electrical Co.,* 788 F.2d 242 (4th Cir. 1986), the Fourth Circuit considered the commencement of the running of the statute of limitations under circumstances very similar to those herein. The *A-A-A* defendants were convicted of conspiracy to rig bids for electrical public works contracts in violation of section 1 of the Sherman Act. *Id.* at 243. On appeal, they contended that the indictment should have been dismissed as time-barred, as the conspiracy was complete and its purpose fulfilled on the date the rigged bids were submitted, more than five years prior to the filing of the indictment. *Id.* at 244. The Fourth Circuit observed that the purpose of the conspiracy was to obtain a non-competitive, artificially high price for

the electrical contracts. Thus, the request for and receipt of final payment "reflected the inflated and anticompetitive price for the work *** (and was) necessary to the successful consummation of the bid-rigging agreement." *Id.* at 245. The court concluded that the statute did not begin to run until *after* the payment was received. [1]

Likewise, in *United States v. Inryco, Inc.*, 642 F.2d 290 (9th Cir. 1981), the Ninth Circuit held that a bid-rigging conspiracy did not terminate when the bids were submitted, but rather when the objective of the conspiracy was met. *Id.* at 293. This objective was to restrain competition, to gain a "non-competitive advantage," *id.* at 295, and the award of subcontract work, purchase orders, and monetary payments pursuant to the contracts all furthered that objective. *Id.* "(T)he scope of the conspiracy encompassed more than naked submissed of rigged bids." *Id.* at 294.

The reasoning of the *A-A-A* and *Inryco* courts is persuasive.[2] We conclude that the district court erred in dismissing the indictment against Northern Improvement, F-M Asphalt, and Steve McCormick. The statute of limitations did not begin to run until after Northern Improvement accepted payment from the City of Fargo on July 28, 1981. *See A-A-A*, 788 F.2d at 245-46; *Inryco*, 642 F.2d at 294-95. The district court's dismissal of the indictment is reversed and the case is remanded for trial.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[1]The district court and the defendants distinguish *A-A-A* on the basis of payoffs made among the conspirators after receipt of payment on the contracts, characterized by the defendants as concerted and overt acts. *Northern Improvement,* slip op. 6-7, 9. While it is true that the *A-A-A* court discusses the payoffs, 788 F.2d at 245, we think that the court's reference to payment as being integral to the agreement's purpose--to produce inflated, anti-competitive prices--shows that the payoffs were not necessary to the court's holding. Moreover, the act of accepting funds in payment of a contract by a single conspirator, if in furtherance of the purpose of the conspiracy, may toll the running of the statute of limitations as to the conspiracy whether or not the payment is later divided among the conspirators. *United States v. Girard,* 744 F.2d 1170, 1173-74 (5th Cir. 1984).

[2]The defendants contend that the Fifth Circuit's opinion in *United States v. Davis,* 533 F.2d 921 (5th Cir. 1976), dictates a result contrary to that we reach today. The *Davis* defendants were charged under the general conspiracy statute, 18 U.S.C. § 371, with conspiring to knowingly and wilfully make false statements as to material facts within the jurisdiction of the United States Department of Labor, Manpower Division, in violation of 18 U.S.C. §1001. *Id.* at 923. The Fifth Circuit held that the defendants' convictions were time-barred because the object of the conspiracy was to make the false statements, all of which were made outside the applicable limitations period *Id.* at 927. The government urged, as in this case, that the ultimate object of the conspiracy was to profit from the statements. The court's rejection of this argument was based on a narrow reading of the indictment. *Id.*

In the present case, the indictment charges the defendants with conspiracy to restrain trade in violation of the Sherman Act. This restraint is accomplished both by the submission of non-competitive bids *and* by the request for and receipt of payments at anti-competitive levels. *A-A-A,* 788 F.2d at 245. The Davis indictment merely charged conspiracy to make certain false statements. When those statements were made, the conspiracy was over. *Davis,* 533 F.2d at 927. We believe *Davis* is inapposite.

The defendants also contend that their position is supported by a recent dismissal of an indictment by a court relying on the district court's decision in this case. *See United States v. Evans & Assocs. Constr. Co.,* No. C-86-77 (W.D. Okla. Nov. 18, 1986). As we reverse the district court's dismissal of the instant indictment, we believe that the case cited by the defendants is not persuasive.

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

NORTHERN IMPROVEMENT COMPANY, ET AL,

Appellees.

Civil No. 86-5215-ND

Appellees' petitions for rehearing en banc have been considered by the court and are denied.

Petitions for rehearing by the panel are also denied.

May 8, 1987

Order Entered at the Direction of the Court:

Clerk, United States Court of Appeals,
Eighth Circuit